IN THE
MISSOURI SUPREME COURT

JOHN MIDDLETON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 83909
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT
THE HONORABLE FRANK CONLEY, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

Both original Statements are incorporated here.

POINTS RELIED ON

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THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIM COUNSEL WAS INEFFECTIVE IN MAKING PENALTY PHASE OPENING STATEMENTS AND CLOSING ARGUMENTS OFFERING AS A "RATIONALE" NOT TO IMPOSE DEATH THAT MR. MIDDLETON ALREADY HAD A DEATH SENTENCE FOR THE PINEGAR KILLING AND COULD NOT BE KILLED MORE THAN ONCE BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. AMENDS. VI, VIII, AND XIV, IN THAT THE OVERRIDING, PREDOMINANT THEME OF COUNSEL'S ARGUMENT WAS THAT MR. MIDDLETON SHOULD NOT BE SENTENCED TO DEATH HERE BECAUSE HE ALREADY HAD A DEATH SENTENCE AND THAT ARGUMENT DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY AND LESSENED FOR THE JURY THE SERIOUSNESS OF THE DECISION IT WAS CHARGED TO MAKE.

Strickland v. Washington, 466 U.S. 668 (1984);

Hall v. Washington, 106 F.3d 742 (7th Cir. 1997);

People v. Woolley, 2002 W.L. 254025 (Ill. Feb. 22, 2002);

People v. Davis, 452 N.E.2d 525 (Ill. 1983);

U.S. Const., Amends. VI, VIII, and XIV; and

Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital Cases, 1973-1995, 78 Tex.L.Rev.1839(2000).

III. UNDISCLOSED DEALS

THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIM RESPONDENT FAILED TO DISCLOSE THE DEAL WITH JOHN THOMAS IN EXCHANGE FOR HIS TESTIMONY BECAUSE THAT RULING DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT THE DOCKET ENTRY THAT RESPONDENT WAS DELAYING PROSECUTION DUE TO THOMAS' PARTICIPATION AS A WITNESS IN COMPANION PROCEEDINGS, THE HARRISON COUNTY PROSECUTOR'S REFUSAL TO BE FORTHCOMING ABOUT WHY THOMAS' CASE HAD BEEN DELAYED, THOMAS' TESTIMONY AT BOTH OF MR. MIDDLETON'S TRIALS, AND THE ESPECIALLY LENIENT TREATMENT THOMAS RECEIVED LESS THAN ONE MONTH AFTER HIS TESTIMONY IN MR. MIDDLETON'S SECOND CASE ALL ESTABLISH THERE WAS AN UNDERSTANDING THOMAS WOULD BE TREATED LENIENTLY AND THAT UNDERSTANDING WAS NOT DISCLOSED.

Commonwealth v. Strong,761A.2d1167(Pa.2000);

Brady v. Maryland,373U.S.83(1963); and

U.S. Const., Amends. VI, VIII, and XIV.

IV. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR FIRST DEGREE MURDER

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT COUNSEL PRESENTED DEFENSE THEORIES THAT WERE INHERENTLY CONTRADICTORY AND INCONSISTANT FROM GUILT TO PENALTY PHASE.

Clayton v. State,63S.W.3d201(Mo.banc2002);

State v. Harris,870S.W.2d798(Mo.banc1994); and

U.S. Const., Amends. VI, VIII, and XIV.

V. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT ALL OF THIS MITIGATING EVIDENCE THAT SHOULD HAVE BEEN PRESENTED WAS DIFFERENT FROM WHAT COUNSEL PRESENTED AND THERE IS A REASONABLE PROBABILITY THAT HAD THIS EVIDENCE BEEN PRESENTED MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

Jermyn v. Horn,1998W.L.754567, aff'd., Jermyn v. Horn,266F.3d257(3rdCir.2001);

Kenley v. Armontrout,937F.2d1298(8thCir.1991); and

U.S. Const., Amends. VI, VIII, and XIV.

VI. FAILURE TO PRESENT ALL MITIGATING EVIDENCE - JANICE MIDDLETON

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Terry Williams v. Taylor,529U.S.362(2000); and

U.S. Const., Amends. VI, VIII, and XIV.

IX. FAILURE TO CALL BRIAN FIFER

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL BRIAN FIFER IN PENALTY TO EXPLAIN THAT THE PHRASE "SELL THIS ADDRESS," WHICH APPEARED IN A LETTER MR. MIDDLETON SENT HIS SISTER, WAS NOT A THREAT BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT OTHER TEXT IN THE LETTER WHICH CONTAINED THIS PHRASE SUPPORTED MR. FIFER'S CONSTRUCTION OF THE MEANING OF THIS PHRASE, AND THEREBY, WOULD HAVE MADE HIS TESTIMONY PERSUASIVE FOR THE JURY.

U.S. Const., Amends. VI, VIII, and XIV.

ARGUMENT

I. PINEGAR MATTERS SHOULD HAVE BEEN EXCLUDED

THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIM COUNSEL WAS INEFFECTIVE IN MAKING PENALTY PHASE OPENING STATEMENTS AND CLOSING ARGUMENTS OFFERING AS A "RATIONALE" NOT TO IMPOSE DEATH THAT MR. MIDDLETON ALREADY HAD A DEATH SENTENCE FOR THE PINEGAR KILLING AND COULD NOT BE KILLED MORE THAN ONCE BECAUSE MR. MIDDLETON WAS DENIED HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. AMENDS. VI, VIII, AND XIV, IN THAT THE OVERRIDING, PREDOMINANT THEME OF COUNSEL'S ARGUMENT WAS THAT MR. MIDDLETON SHOULD NOT BE SENTENCED TO DEATH HERE BECAUSE HE ALREADY HAD A DEATH SENTENCE AND THAT ARGUMENT DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY AND LESSENED FOR THE JURY THE SERIOUSNESS OF THE DECISION IT WAS CHARGED TO MAKE.

The predominant focus and theme of counsel's penalty closing argument was that the jury should not sentence Mr. Middleton to death because he already had a death sentence. Defense counsel injected Mr. Middleton's prior death sentence into this case during her penalty phase opening statement. Counsel's theme denied Mr. Middleton his

rights to effective assistance of counsel, due process, and to be free from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

This Court should find that counsel's injecting Mr. Middleton's prior death sentence into this case during opening statement and arguing that the jury should not impose death because Mr. Middleton already had a death sentence not to be reasonable under Strickland v. Washington, 466 U.S. 668, 687 (1984).[1] Mr. Middleton was prejudiced because counsel's opening statement and argument diminished the jury's sense of responsibility for the seriousness of the punishment decision they were charged with making.

C. RESPONDENT CAN ONLY KILL MR. MIDDLETON ONCE[2]

Respondent contends that Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) is inapplicable because Mr. Middleton's counsel's argument was not confined to solely arguing death should not be imposed because Mr. Middleton already had a death sentence (Resp.Br.24-26). In Hall, counsel's argument, however, also included discussion of mitigating matters recognized under Illinois law along with the unreasonable, improper

[1] The Points Relied On and arguments in this entire reply brief address only those matters undersigned counsel believes require a response to matters contained in respondent's brief. Mr. Middleton is not waiving any of the other claims and Points contained in his original brief which are not specifically discussed in this reply brief.

[2] For clarity, the same lettering scheme followed in the original brief is carried over in this Point.

arguments counsel made. See Hall,106F.3d at 747. Counsel in Hall was ineffective because the predominant theme and focus of the argument urged the sentencing judge to disregard the law of Illinois and decide punishment on wholly extralegal grounds. Hall,106F.3d at 750. The same is true in Mr. Middleton's case. The predominant and overriding focus of counsel's argument was that Mr. Middleton already had a death sentence, and therefore, he should not be sentenced to death again (T.Tr.1062-74).

The respondent would like for this Court to believe that counsel's argument properly focused on Mr. Middleton and why death was not the appropriate punishment by creating a fourteen item list of what counsel did during argument besides argue death should not be imposed because Mr. Middleton already had a death sentence (Resp.Br.25). In fact, those fourteen items really constitute only two - that life without parole is an adequate punishment and that Mr. Middleton committed the alleged acts while under the influence of drugs. The argument in Mr. Middleton's case, like the argument in Hall, was ineffective because the predominant theme was directed at persuading the sentencer to disregard the law and decide punishment on wholly extralegal grounds.

Since Mr. Middleton's original brief was filed, the Illinois Supreme Court decided People v. Woolley,2002W.L.254025(Ill.Feb.22,2002). In Woolley, the defendant's death sentence had been reversed for a new penalty proceeding. Woolley,2002W.L.254025*1. During the trial court's introductory remarks to the first panel of jurors, on retrial of the penalty, it told them Woolley had previously been sentenced to death and admonished them not to consider that result. Woolley,2002W.L.254025*1-2. In reversing Woolley's death sentence again, the Illinois Supreme Court found that informing the jury of the

prior death sentence verdict was prejudicial and inflammatory because it may have diminished the jury's sense of responsibility for imposing death again. Woolley, 2002W.L.254025*5.

The Woolley decision was based on that Court's much earlier decision in People v. Davis,452N.E.2d525(Ill.1983). See Woolley,2002W.L.254025*4-6. In Davis, the jury was told during penalty that Davis already had been sentenced to death for a murder other than the one for which he was then on trial. Davis,452N.E.2d at 536-37. In reversing Davis' death sentence, the Davis Court reasoned that having received a death sentence for another unrelated murder had "absolutely no relevance" to whether Davis should be sentenced to death for a different offense. Davis,452N.E.2d at 537. That Court also concluded that the knowledge twelve other jurors had voted for death could have swayed the jury's verdict in favor of death. Davis,452N.E.2d at 537. Finally, the Davis Court observed:

> Further, the jury's awareness of defendant's prior death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would.

Davis,452N.E.2d at 537.

The decisions in both Woolley and Davis demonstrate why counsel's opening statement and argument were not reasonable. Woolley and Davis reflect that counsel's actions here would have lessened the jurors' sense of responsibility. The Woolley

decision highlights how prejudicial this type of information is to a jury because even though the trial judge admonished the jury not to consider the prior death sentence, it was simply informing the jury of that prior death sentence that required reversal. Woolley, 2002W.L.254025*6. That information was prejudicial to Woolley, even though he was convicted of six murder counts. Woolley,2002W.L.254025*1. Moreover, Davis is particularly instructive here because, like Mr. Middleton, his prior death sentence arose from a case unrelated to the one for which he was then on trial. Likewise, evidence of the prior death sentence in Davis was prejudicial even though the jury had been instructed that Davis had previously been convicted of four prior homicides. Davis,452N.E.2d at 536.

According to respondent, counsel acted reasonably because she had to address Mr. Middleton's death sentence (Resp.Br.25). While counsel may have needed to address that Mr. Middleton had a prior homicide conviction, counsel did not have to inject into the case in opening statement that Mr. Middleton already had a death sentence (T.Tr.854). Respondent asserts that the jury would have learned of the prior death sentence (Resp.Br.36). However, respondent cites no relevant case that has held that evidence that a defendant already has a death sentence is admissible. While evidence of the fact of a prior homicide conviction can be admitted, this Court has never held that a punishment of death was also admissible.[3] The only reason the jury learned Mr.

[3] As discussed in Mr. Middleton's original brief, Callaway App.Br.44-47, the details and the sentence for a prior homicide are not properly admissible. Additionally, as argued in

Middleton already had a death sentence was because defense counsel injected the death sentence into her penalty opening statement (T.Tr.854). The case respondent cites in making its sweeping assertion is State v. Gilyard,979S.W.2d138(Mo.banc1998). The Gilyard case dealt with issues directed at challenges involving the predatory sexual offender statute and was not a death penalty case. See Gilyard,979S.W.2d at 138-40.

Respondent quotes out-of-context a few words taken from the prosecutor's rebuttal penalty argument to assert Mr. Middleton was not prejudiced (Resp.Br.28-29). In particular, respondent claims that the prosecutor did not argue that death should be imposed because federal courts grant relief with great frequency because the prosecutor's argument was limited to talking about many different levels of appeals (Resp.Br.28-29). The prosecutor's rebuttal argument, in context, was as follows:

> MS. KOCH: She didn't talk to you about the many different levels of appeals that these cases go through. She didn't talk to you about the Federal Court of Appeals and how often those cases got overturned on appeal because they're death penalty cases. She didn't talk to you about any of that, did she?

(T.Tr.1074). The words "many different levels of appeals" appeared in the sentence that precedes the discussion of the federal court of appeals. In the following sentence, the

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the original brief, Callaway App.Br.43-44, under the facts presented here and this Court's decision in State v. Harris,870S.W.2d798,813(Mo.banc1994), it was improper to introduce even evidence of the fact of the conviction for the Pinegar homicide.

prosecutor expressly linked federal courts of appeals with "how often those cases get overturned." The prosecutor did make the argument that death must be imposed because of how frequently federal courts of appeals reverse death penalty cases.

Respondent asserts that the prosecutor's argument was proper because Liebman, Fagan, West, and Lloyd, Capital Attrition: Error Rates In Capital Cases, 1973-1995, 78 Tex.L.Rev.1839,1849-50(2000) found the "overall error-rate" in capital cases was 68% (Resp.Br.28-29,32-33). The prosecutor's argument was prejudicial and improper because the jury was urged to impose death based on the alleged tremendous frequency of federal court reversals of death penalty cases when in fact the Error Rates article found only 10% of all death penalty reversals occurred in federal court. Error Rates,78Tex.L.Rev. at 1844,1849,1855(2000).

According to respondent, there was no violation of Caldwell v. Mississippi, 472U.S.320(1985) because counsel's argument "did not improperly describe the jury's role. . . ." (Resp.Br.29 relying on State v. Richardson,923S.W.2d301,321(Mo.banc1996)). Counsel's argument here improperly described the jury's role because the jury was urged to decide punishment on grounds that Missouri law did not sanction - that Mr. Middleton already had one death sentence.

The respondent asserts Mr. Middleton was not prejudiced because the fact of Mr. Middleton's prior conviction for murder would have still resulted in death here (Resp.Br.28). That argument is contrary to the conclusion reached in Davis. The Davis Court concluded that it was the knowledge of a prior death sentence in an unrelated

killing that was prejudicial and not the fact of a prior homicide conviction that was prejudicial. Davis,452N.E.2d at 536-37.

The respondent also relies on counsel's testimony that she "spent a lot of time thinking about" whether she should inform the jury about Mr. Middleton's prior death sentence (Resp.Br.27 relying on R.Tr.357-58). Under Strickland v. Washington, 466U.S.668,687(1984), the standard by which counsel's action are to be judged is whether counsel exercised reasonable judgment, not how much time counsel spent in making any judgment. See, also, State v. McCarter,883S.W.2d75,78(Mo.App.,S.D.1994) (counsel's strategy must be reasonable under prevailing professional norms). Under Davis' rationale, supra, counsel's decision clearly was not reasonable under prevailing professional norms.

D. FAILURE TO ADEQUATELY OBJECT TO APPEALS PROCESS ARGUMENT

According to respondent, the prosecutor's rebuttal argument about the appeals process was proper retaliation to defense counsel's argument (Resp.Br.32). The prosecutor's retaliatory argument serves only to underscore the unreasonableness of defense counsel having argued the jury should not impose death because Mr. Middleton already had a death sentence. It was the ineffective argument of counsel that invited the prosecutor's improper responses.

This Court should order a new penalty phase.

III. UNDISCLOSED DEALS

THE MOTION COURT CLEARLY ERRED IN DENYING THE CLAIM RESPONDENT FAILED TO DISCLOSE THE DEAL WITH JOHN THOMAS IN EXCHANGE FOR HIS TESTIMONY BECAUSE THAT RULING DENIED MR. MIDDLETON HIS RIGHTS TO DUE PROCESS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO CONFRONT THE WITNESSES AGAINST HIM, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT THE DOCKET ENTRY THAT RESPONDENT WAS DELAYING PROSECUTION DUE TO THOMAS' PARTICIPATION AS A WITNESS IN COMPANION PROCEEDINGS, THE HARRISON COUNTY PROSECUTOR'S REFUSAL TO BE FORTHCOMING ABOUT WHY THOMAS' CASE HAD BEEN DELAYED, THOMAS' TESTIMONY AT BOTH OF MR. MIDDLETON'S TRIALS, AND THE ESPECIALLY LENIENT TREATMENT THOMAS RECEIVED LESS THAN ONE MONTH AFTER HIS TESTIMONY IN MR. MIDDLETON'S SECOND CASE ALL ESTABLISH THERE WAS AN UNDERSTANDING THOMAS WOULD BE TREATED LENIENTLY AND THAT UNDERSTANDING WAS NOT DISCLOSED.

This Court should reverse Mr. Middleton's convictions because respondent failed to disclose its understanding that John Thomas would be treated with leniency if he testified favorably for respondent against Mr. Middleton in his Callaway and Adair County cases. The nondisclosure of that understanding denied Mr. Middleton his rights

to due process, to be free from cruel and unusual punishment, and to confront the witnesses against him. U.S. Const. Amends. VI, VIII, and XIV.

A. THOMAS' UNDISCLOSED DEAL

The February 27, 1998 docket entry "state advises delay in prosecution due to 's participation as witness in companion proceedings," see App.Br.66, when viewed in conjunction with other matters, establishes there was the kind of non-disclosure here that required reversal in Commonwealth v. Strong,761A.2d1167(Pa.2000). See App.Br.72-74 discussion of Strong. The chart history of Thomas' charge (Callaway App.Br.66-67) did not include when Thomas testified in Mr. Middleton's Adair case. Thomas testified in Mr. Middleton's Adair case on March 4, 1997 and March 11, 1997 (Adair T.Tr. Vols. XII and XVI Indices). Thus, the Adair testimony occurred after Thomas was charged on June 8, 1995 (Callaway App.Br.65 - see first chart entry) and prior to the court's docket entry in Thomas' case on February 27, 1998 (Callaway App.Br.65-66 - see second chart entry).

In the Adair case on cross-examination, Thomas testified that even though he was charged in 1995 his case had never gone to a preliminary hearing (Adair T.Tr.2355).[4] Thomas also testified that he was told his case would be dealt with "[a]fter these trials" (Adair T.Tr.2355) (emphasis added) and "[a]fter all of [the trials]" (Adair T.Tr.2356) (emphasis added) involving Mr. Middleton. Thomas also testified it was "their decision" to allow his case to sit around even though he was charged in June of 1995 (Adair

[4] On December 13, 2001, this Court took judicial notice of the entire contents of this Court's files in both of Mr. Middleton's criminal appeals. See App. Br. at 1 n.2.

T.Tr.2356). Thomas testified in both the Callaway trial, see Callaway App. Br. 63-64, and the Adair case that he had a single pending drug charge case (Callaway T.Tr.556,559,560-64,573-74;AdairT.Tr.2354-56).

Respondent asserts that there was no evidence that the "companion proceedings" referenced in the February 27, 1998 docket entry referred to Mr. Middleton's case. The only "companion proceedings" that existed at the time of the February 27, 1998 docket entry were Mr. Middleton's Callaway case. When the February 27, 1998, docket entry was made, Thomas had already testified in March 1997 at Mr. Middleton's Adair trial.

Respondent also argues that "companion proceedings" could refer to Thomas' "other drug related offenses" (Resp.Br.54). Such an argument is refuted by Thomas' own testimony in both trials where he acknowledged having a single drug related case (Callaway T.Tr.556,559,560-64,573-74;AdairT.Tr.2354-56). Moreover, if Thomas did in fact have "other drug-related offenses" then respondent's failure to disclose such matters would constitute its own independent discovery violation.

Respondent asserts that "companion proceedings" could indicate "proceedings related to Thomas' pending case" (Resp.Br.54). That argument simply is contrary to the text of the docket entry when considered in its entirety. Specifically the docket entry states; "state advises delay in prosecution due to 's participation as witness in companion proceedings" (Ex.42) (emphasis added). That entry states that the delay is caused because of Thomas' status as a witness. The court would not have made a docket entry that stated Thomas' case was being delayed because of his status as a witness in his

own case. Respondent's contention that the court would have made such a docket entry simply defies logic.

Respondent also states that even if "companion proceedings" referred to Mr. Middleton's case, the docket entry does not prove Thomas was given a deal (Resp.Br.55). As discussed in the original brief, the facts here evidence there was "an understanding" that Thomas would be treated with leniency and it is unnecessary to show "an ironclad agreement." See Callaway App.Br.72-74 discussion of Commonwealth v. Strong, 761A.2d167(Pa.2000). At the Adair 29.15 hearing, one of Mr. Middleton's Adair trial counsel, Ms. Holden, testified that when she asked respondent, and in particular the Harrison County prosecutor, why Thomas' case was allowed to remain pending in Associate Circuit Court for two years she was not given an answer (Adair R.Tr.487-88,493-94).[5] When the docket entry is considered in conjunction with Thomas' testimony in both trials, the Harrison County prosecutor's refusal to reveal why Thomas' case was allowed to remain in Associate Circuit Court for as long as it did, and that

[5] On April 8, 2002, a motion was filed that requested this Court take judicial notice of the record on appeal in Mr. Middleton's Adair County 29.15 case. On April 9, 2002, respondent filed suggestions in opposition to taking judicial notice. On April 10, 2002, Mr. Middleton filed a response to respondent's suggestions in opposition to judicial notice. This reply brief was due on April 15, 2002 and oral argument was set for April 25, 2002. When this reply brief was submitted for delivery and filing on April 15, 2002, undersigned counsel had not received a ruling on the request for judicial notice.

Thomas pled guilty less than one month after he testified in the second case against Mr. Middleton receiving a probation disposition, it is apparent that there was "an understanding" that Thomas would be treated with leniency if the State was pleased with his testimony against Mr. Middleton in both of Mr. Middleton's cases. See Strong,761A.2d at 1174-75 and Callaway App.Br.72-74. In Strong, the Pennsylvania Court relied on "circumstantial evidence of an understanding" to find a Brady violation. See Strong,761A.2d at 1174. Here, the circumstantial evidence encompasses the docket entry, Thomas' testimony at both trials about how his case was being treated, the Harrison County Prosecutor's refusal to be forthcoming about why Thomas' case was allowed to remain in Associate Circuit Court for as long as it did, and Thomas' guilty plea less than one month after testifying in Mr. Middleton's second case with a probation disposition. These all establish there was an "understanding" that required disclosure under Brady v. Maryland,373U.S.83(1963). It was not necessary to establish the specifics of any discussions between the State and Thomas' counsel (Resp.Br.54) because the circumstantial evidence here establishes there was an understanding Thomas would be treated with leniency.

This Court should reverse Mr. Middleton's convictions.

IV. MR. MIDDLETON LACKED THE REQUIRED MENTAL STATE FOR FIRST DEGREE MURDER

THE MOTION COURT CLEARLY ERRED IN OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL IN GUILT DRS. MURPHY, LIPMAN, AND DANIEL TO SUPPORT THE DEFENSE HE WAS NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT OR SUFFERED FROM A DIMINISHED CAPACITY BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT COUNSEL PRESENTED DEFENSE THEORIES THAT WERE INHERENTLY CONTRADICTORY AND INCONSISTANT FROM GUILT TO PENALTY PHASE.

Mr. Middleton's counsel were ineffective because they presented defense theories that were inherently contradictory from the guilt to penalty phases. In guilt, counsel's theory was that Mr. Middleton did not commit the charged acts. In penalty, counsel's theory was that while Mr. Middleton had committed the charged acts, his behavior should be excused because of his methamphetamine use. Mr. Middleton was denied effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV.

Respondent argues that counsel acted reasonably when they presented a guilt phase defense that Mr. Middleton did not commit the charged homicides followed by a

penalty phase defense that Mr. Middleton's acts should be excused because of his mental impairments (Resp.Br.67-68,74-75). To support its argument, respondent relies on this Court's decision in Clayton v. State,63S.W.3d201(Mo.banc2002). The decision in Clayton, however, does not support the inconsistent theories counsel presented here across guilt and penalty phases. Counsel in Clayton presented alternative, guilt phase defense theories. Clayton,63S.W.3d at 206-07. One guilt phase theory was that a reasonable doubt of guilt existed. Clayton,63S.W.3d at 206-07. The other guilt phase theory was that the defendant had acted with a diminished capacity. Clayton,63S.W.3d at 206-07. Counsel acted reasonably in Clayton because "[b]oth can be equally true and exist at the same moment in time." Clayton,63S.W.3d at 207.

Unlike Clayton, counsel here did not act reasonably. The theories counsel presented here, unlike Clayton, cannot be equally true and exist at the same moment in time. More particularly, it is not possible for Mr. Middleton to be not guilty because he did not commit the charged acts and to also be guilty of having done the charged acts, but his acts should be excused because of his mental impairments that resulted from his drug use. For these reasons, Clayton is inapplicable.

As discussed in Mr. Middleton's original brief, the controlling decision here is State v. Harris,870S.W.2d798,815-16(Mo.banc1994). See Callaway App.Br.91-93. In particular, Harris recognized the need for consistent theories across the guilt and penalty phases. Harris,870S.W.2d at 815-16. That consistency was lacking in Mr. Middleton's case.

The respondent also asserts "while claiming counsel was ineffective for using inconsistent theories appellant also claims counsel was ineffective for failing to use inconsistent theories" (Resp.Br.75 n.14 (respondent's emphasis)). The respondent supports this erroneous representation asserting Mr. Middleton's brief contends a mental health defense should have been presented in guilt while also claiming in Point X counsel should have presented evidence Dan Spurling committed the charged acts (Resp.Br.75 n.14). Mr. Middleton's position is that counsel were ineffective for failing to present in guilt phase a mental health defense. In the event this Court concludes, however, counsel were not ineffective for failing to present in guilt a mental health defense, then Mr. Middleton contends counsel were ineffective in the presentation of their not guilty defense because they failed to present any evidence to support Spurling committed the charged acts. See Point X. Counsel's guilt phase defense was someone else committed the crimes and that person was Spurling (R.Tr.351-52). Despite having that theory of defense, counsel presented no evidence to warrant the jury concluding Spurling did the crimes. The respondent's brief in fact concedes counsel's ineffectual efforts to attribute responsibility to Spurling stating their defense "obliquely suggested (without ever directly arguing) that Dan Spurling could have committed the crimes . . ." (Resp.Br.67) (respondent's parenthetical). Effective counsel would have wanted to strongly show that Spurling committed the offense.

This Court should reverse for a new trial.

V. FAMILY AND EMPLOYER MITIGATION

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL EMPLOYER AND FAMILY MITIGATION WITNESSES CHARLES WEBB, VERN WEBB, VIRGINIA WEBB, RUBY SMITH, SYLVIA PURDIN, AND GLENN WILLIAMS BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT ALL OF THIS MITIGATING EVIDENCE THAT SHOULD HAVE BEEN PRESENTED WAS DIFFERENT FROM WHAT COUNSEL PRESENTED AND THERE IS A REASONABLE PROBABILITY THAT HAD THIS EVIDENCE BEEN PRESENTED MR. MIDDLETON WOULD HAVE BEEN SENTENCED TO LIFE.

The motion court denied Mr. Middleton's claim counsel was ineffective for failing to present mitigating evidence from Charles Webb, Vern Webb, Virginia Webb, Ruby Smith, Sylvia Purdin, and Glenn Williams. That ruling was clearly erroneous because Mr. Middleton was denied his rights to effective assistance, due process, and freedom from cruel and unusual punishment. U.S. Const. Amends. VI, VIII, and XIV. There is a reasonable probability Mr. Middleton would have been sentenced to life had these witnesses testified because their testimony was different from the evidence counsel did present.

Respondent argues that Mr. Middleton failed to prove counsel was ineffective because his trial attorneys were not asked "whether they were aware of facts that these six witnesses were prepared to testify about" (Resp.Br.78-79). Counsel testified that they did not contact any of the witnesses who it is alleged should have been called (R.Tr.269-70,332-33). Because counsel never contacted any of the witnesses at issue, it necessarily follows that they were not aware of the testimony that these witnesses could have supplied. Counsel breached their duty to investigate. See, e.g., Kenley v. Armontrout, 937F.2d1298,1304(8thCir.1991).

The respondent asserts that counsel acted reasonably because they presented testimony through Mr. Middleton's mother (Janice Middleton), Dr. Lipman, and employees at the Potosi Correctional Center (Resp.Br.81-82). The evidence that could have been presented through the Webbs, Ruby Smith, Sylvia Purdin, and Glenn Williams, however, was different from what was presented through the witnesses who counsel called. See App.Br.101-05 (detailing how these witnesses would have testified). Respondent's argument amounts to attempting to cast Mr. Middleton's claim as one of counsel's failure to present all available mitigating evidence (Resp.Br.83). That type of argument has been rejected because "[p]resentation of some mitigating evidence does not excuse the failure to provide evidence of different mitigating circumstances." Jermyn v. Horn,1998W.L.754567 at *17, aff'd., Jermyn v. Horn,266F.3d257,303-12(3rdCir.2001). It is irrelevant that counsel reviewed twelve boxes of materials that Mr. Middleton's Adair case counsel made available and conducted other investigation (Resp.Br.80)

because reasonable counsel would have contacted, interviewed, and called these witnesses. See, e.g., Kenley v. Armontrout,937F.2d at 1304.

According to respondent, Mr. Middleton was not prejudiced because there was more mitigating evidence presented in the Adair County case and Mr. Middleton was also sentenced to death in Adair County (Resp.Br.89). Counsel in Adair County, like counsel here, however, did not call the Webbs, Ruby Smith, and Sylvia Purdin (See Adair County T.Tr. Indices to Vols. 17-19). Since these witnesses were not called in either case, the result in Adair County does not demonstrate a lack of prejudice to Mr. Middleton in counsel failing to call these witnesses in Callaway County.

This Court should order a new penalty phase.

VI. FAILURE TO PRESENT ALL MITIGATING EVIDENCE - JANICE MIDDLETON

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ELICIT SUBSTANTIAL MITIGATING EVIDENCE FROM MR. MIDDLETON'S MOTHER, JANICE MIDDLETON, BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT COUNSEL EXAMINED JANICE MIDDLETON PERFUNCTORILY BECAUSE COUNSEL HAD NOT READ HER TESTIMONY FROM THE ADAIR CASE WHICH WAS AVAILABLE BEFORE THE CALLAWAY CASE WAS TRIED.

Mr. Middleton was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VII, and XIV, when counsel presented a perfunctory examination of his mother, Janice Middleton. Counsel failed to present critical mitigating facts through Janice Middleton because counsel had not reviewed the transcript of her testimony from the Adair case which was available for review.

Respondent asserts that counsel were not ineffective because Mr. Middleton's mother did not disclose to Mr. Middleton's Callaway counsel what she had disclosed to his Adair counsel (Resp.Br.93-94). There is no basis in the record to suggest Mr. Middleton's mother failed to be forthcoming with information for Callaway counsel

when she was so forthcoming with Adair counsel. In any event, the record does establish that the reason counsel failed to present complete and thorough information through Mr. Middleton's mother was that counsel Ms. Davis did not review Janice Middleton's Adair testimony before she testified in Callaway County (R.Tr.381-83). Ms. Davis knew the transcript from the Adair case was completed before the Callaway trial and she had obtained portions of the Adair transcript, but she just had not reviewed Janice Middleton's Adair testimony (R.Tr.381-83).

Respondent asserts that counsel was never asked whether counsel had uncovered the matters that were not presented at the Callaway trial (Resp.Br.93). The respondent also claims there was no evidence that Janice Middleton was willing to testify in Mr. Middleton's Callaway case in the same manner that she had done in his Adair case (Resp.Br.93-94). Since Janice Middleton had testified in the detail that she had done in the Adair case, there is no basis to believe she would not have provided the same testimony in the Callaway case if counsel had only reviewed the transcript of her Adair County testimony, and asked her about those matters during her Callaway testimony.

According to respondent, counsel conducted an extensive examination of Janice Middleton such that Mr. Middleton was not prejudiced (Resp.Br.94). Mr. Middleton's original brief recounted Janice Middleton's Callaway testimony (App.Br.109) and her Adair testimony (App.Br.110-13). A comparison of the two clearly demonstrates there was not an extensive examination of Janice Middleton in the Callaway case.

The respondent argues that the evidence of abuse that was not presented was not critical for the jury to have heard because it demonstrated that Mr. Middleton had

overcome the adversity he had experienced (Resp.Br.95-96). Evidence of the abusive environment in which Mr. Middleton was raised was essential for the jury to comprehend why Mr. Middleton would have committed the acts charged. See Terry Williams v. Taylor,529U.S.362,395(2000)(counsel was ineffective where counsel failed to conduct investigation to uncover extensive evidence of abusive and deprived childhood).

A new penalty phase is required.

IX. FAILURE TO CALL BRIAN FIFER

THE MOTION COURT CLEARLY ERRED OVERRULING THE CLAIM MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CALL BRIAN FIFER IN PENALTY TO EXPLAIN THAT THE PHRASE "SELL THIS ADDRESS," WHICH APPEARED IN A LETTER MR. MIDDLETON SENT HIS SISTER, WAS NOT A THREAT BECAUSE MR. MIDDLETON WAS DENIED EFFECTIVE ASSISTANCE, DUE PROCESS, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VI, VIII, AND XIV, IN THAT OTHER TEXT IN THE LETTER WHICH CONTAINED THIS PHRASE SUPPORTED MR. FIFER'S CONSTRUCTION OF THE MEANING OF THIS PHRASE, AND THEREBY, WOULD HAVE MADE HIS TESTIMONY PERSUASIVE FOR THE JURY.

Mr. Middleton was denied effective assistance of counsel, due process, and freedom from cruel and unusual punishment, U.S. Const. Amends. VI, VIII, and XIV when counsel failed to call Brian Fifer to explain that the phrase "sell this address," as used in a letter Mr. Middleton sent his sister, was not intended to be a threat. Fifer would have been a persuasive witness as to the meaning of this phrase because the other contents of the letter support his construction of the phrase.

The respondent argues that Mr. Middleton was not prejudiced by counsel's failure to call Brian Fifer to provide an accurate explanation for the meaning of "sell this address" because of Fifer's status as an inmate witness would have caused him to not be persuasive (Resp.Br.118).

Mr. Fifer's testimony would have been persuasive to the jury when it is viewed in conjunction with the text of the letter.[6] The letter's first page contains a margin entry that states: "Mom says Hi. So does my Wi[unreadable]." See Reply Brief Appendix at 1. Page Two and the last paragraph of the letter included:

> Can we ever talk or you write back. I am your brother, are you allowed to talk or write to your own brother.
>
> * * * *
>
> P.S. She'll write or I'll sell this address.
>
> Love you wheather [sic] you believe it or not.
>
> /s/ John

See Reply Brief Appendix at 2.

The reproduced portions of the letter are consistent with Mr. Fifer's testimony that Mr. Middleton was expressing his unhappiness with his sister not writing back to him

[6] On April 10, 2002, a motion to file a copy of the "sell this address" letter was filed. A copy was furnished to undersigned by respondent. The copy of the letter was respondent's Exhibit 106 in Mr. Middleton's Adair criminal trial. Leave of this Court to file a copy of the letter was sought because respondent would not stipulate to a filing of a copy of the letter. Respondent would not stipulate to a copy being filed because the letter was not admitted as an exhibit at Mr. Middleton's Callaway trial or 29.15 action. When this reply brief was submitted for delivery and filing on April 15, 2002, undersigned counsel had not received a ruling on the motion to file a copy of the letter.

when he wrote to her and that no threat was intended with the postscript. The letter states that Mr. Middleton's mother, who is also his sister Rose's mother, sends her greetings along with Mr. Middleton's wife doing the same. Those sentiments would not reasonably be expected to appear in a letter which also allegedly threatened to have a "hit" placed on Mr. Middleton's sister.

The letter's last paragraph expressly states that Mr. Middleton is dismayed that his sister has not written letters back to him when he has written to her. See Reply Brief Appendix at 2. That text is entirely consistent with Mr. Fifer's testimony.

Finally, the postscript appeared alongside of the sentiments: "Love you wheather[sic] you believe it or not /s/ John." If Mr. Middleton had intended to threaten his sister, with the postscript, then he would not have alongside such a threat also expressed his love for his sister.

A new penalty phase is required.

CONCLUSION

Mr. Middleton's original and reply briefs request: Points II, III, IV, X, a new trial; Points I, II, V, VI, VII, VIII, IX, X a new penalty hearing; Points IV, VIII further 29.15 proceedings; XI impose life without parole.

Respectfully submitted,

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Certificate of Compliance

I, William J. Swift, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the reply brief contains _____ words, which does not exceed the 7,750 (25% of 31,000) words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

_____
William J. Swift

Certificate of Service

I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were _____, on the ____ day of _____ 2002, to the Office of the Attorney General, 4th Floor of the Broadway Building, Jefferson City, Missouri 65101.

_____
William J. Swift

APPENDIX

INDEX TO APPENDIX TO REPLY BRIEF

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